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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALLEN WRIGHT,

Petitioner

-vs-

AL PARKE, WARDEN,

Respondent

On Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS WILL TOLERATE THE CONVICTION OF ONE ACCUSED OF CRIME WHEN THE ONLY EVIDENCE THAT A CRIME OCCURRED, OR THAT THE ACCUSED WAS THE PERPETRATOR, CONSISTS OF OUT OF COURT STATEMENTS BY THE VICTIM, WHO NEVER TESTIFIED UNDER OATH, NEVER APPEARED IN OPEN COURT NOR IN ANY OTHER JUDICIAL HEARING, AND WHO WAS NEVER SUBJECTED TO CROSS-EXAMINATION.

II

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE INTERVENTION OF THE TRIAL COURT TO DECLARE A MISTRIAL AND/OR TO APPOINT COUNSEL AS MORE THAN A MERE ADVISOR WHEN IT APPEARS THAT THE TRIAL STRATEGY OF A *PRO SE* CRIMINAL DEFENDANT WILL RESULT IN THE ADMISSION OF CRUCIAL, PREJUDICIAL, BUT CONSTITUTIONALLY INADMISSIBLE EVIDENCE AGAINST THE ACCUSED, TO AN EXTENT THAT THE ADVERSARIAL TESTING PROCESS WHICH IS ONE OF THE HALLMARKS OF A FAIR TRIAL WILL BE SO UNDERMINED THAT THE TRIAL CANNOT BE RELIED UPON AS LIKELY TO PRODUCE A JUST RESULT.

PLEASE NOTE: ALL PARTIES TO THIS ACTION ARE NAMED IN THE CAPTION.

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I.

The Decision Below Has Blurred and Obscured the Very Real and Significant Difference Between the Confrontation Clause of the Sixth Amendment and the Hearsay Rule, and Represents an Abuse of the Confrontation Clause of the Most Blatant Sort, With the Result That the Petitioner is Imprisoned for 66 Years on the Hearsay Statements of a Witness Who Was Never Present in Court, Never Under Oath and Never Subject to Cross Examination. The Decision Below Thus Conflicts With the Decision of This Court in Brookhart v. Janis, 384 U.S. 1 (1966).

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THE ISSUE:

Whether the Sixth and Fourteenth Amendments Will Tolerate the Conviction of One Accused of Crime When the Only Evidence That a Crime Occurred, or That the Accused Was the Perpetrator, Consists of Out of Court Statements by The Victim, Who Never Testifies Under Oath, Never Appears in Open Court Nor in Any Other Judicial Hearing, and Who is Never Subjected to Cross-Examination 12

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THE ISSUE:

Whether the Due Process Clause of the Fourteenth Amendment Requires the Intervention of the Trial Court to Declare a Mistrial and/or to Appoint Counsel as More Than a Mere Advisor When it Appears That the Trial Strategy of a *Pro Se* Criminal Defendant Will Result in the Admission of Crucial, Prejudicial, but Constitutionally Inadmissible Evidence Against the Accused, to an Extent That the

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PETITION

William Allen Wright, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The opinion of the United States Court of Appeals is unreported and is appended to this Petition as Appendix A. The opinion of the District Court is unreported and is appended hereto as Appendix B. The decision of the Kentucky Supreme Court is unreported and appended hereto as Appendix C.

JURISDICTION

The decision of the Court of Appeals was rendered on the 17th day of October, 1984. On January 7, 1985, under case No. A-521, Justice O'Connor extended the time for filing this Petition until on or before March 1, 1985. The Petition is timely filed, and jurisdiction is founded upon 28 U.S.C. 1254(1), petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him: to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT, SECTION 1, UNITED STATES CONSTITUTION:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While there were alleged in the state court violations of Kentucky criminal statutes, the precise language of the statutes is unnecessary for consideration or determination of the issues involved in this case.

STATEMENT OF THE CASE

A. OVERVIEW:

Petitioner is presently serving a 66-year sentence in the Kentucky penal system for first degree burglary, first degree sodomy, second degree assault, and intimidating a witness. His sentences were enhanced to their present level by petitioner's conviction after a second trial by the same jury of being being a persistent felony offender.

Petitioner's appeals in the state appellate system were to no avail, and he then proceeded to apply for federal habeas corpus relief in the United States District Court for the Western District of Kentucky. Unsuccessful there, he appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the District Court.

B. STATEMENT OF FACTS:

The alleged offenses giving rise to this case occurred on May 9, 1980. One Deborah L. Anderson called her parents in the late afternoon on that date, and they went immediately to

her apartment, in Louisville, Kentucky. When they arrived, Ms. Anderson seemed very upset and described to them an incident which allegedly had occurred shortly before at her apartment. As she related the incident to her parents, when she arrived home from work, a man was in her apartment, and he assaulted her, tied her to the bed, cut her wrists, and attempted oral sodomy with her. When the telephone rang, he left. The police and an ambulance were called. Following interviews of Ms. Anderson by police (at which her parents were not present), and emergency treatment of her wounds, she was taken to a hospital emergency room.

Ms. Anderson had told the investigating officers the same story as related above, with the important exception that she never told them about the sexual assault. The officers noted that she had been drinking, and they initially believed a distinct possibility existed that what had occurred was a suicide attempt. An employee of the apartment complex was present with the first officer on the scene, and overheard the description of the attacker given to police by Ms. Anderson. Believing that the description matched another apartment resident, petitioner Wright, the employee imported this opinion to police. A photo pack including petitioner's picture was assembled and shown to Ms. Anderson on May 15, 1980, almost a week later. According to police, she identified petitioner as her attacker. Petitioner was arrested, charged and indicted on the burglary, sodomy and assault charges.

On July 15, 1980, Ms. Anderson alleged that petitioner had followed her and had engaged in other acts which intimidated her, and petitioner was charged with intimidation of a witness as well.

Prior to trial, Ms. Anderson died without having ever given testimony in court, or in any other hearing where she was under oath and subject to cross examination. As the case was called for trial, the prosecution requested a continuance, and the defense objected, and moved for a dismissal, apparently because it would be impossible for the state to make its case

without any direct evidence from Ms. Anderson. The trial court agreed with the defense and dismissed the case.

The state appealed, and the court of appeals reversed the orders of dismissal on September 21, 1981. The prosecution moved to remove the judge who had dismissed the case from the case, and that judge was eventually replaced as trial judge by a judge who had previously represented petitioner, and the matter was reassigned once again. Petitioner indicated a desire to represent himself at trial, and advisory counsel was appointed from the Public Defender's Office.

At the trial, no physical evidence was presented which linked petitioner in any way with the offenses; there were no fingerprints, hair samples, etc. removed from Ms. Anderson's apartment which were identified with petitioner. The officer in charge of the investigation admitted in his testimony that there was no such evidence. (R. 95, p. 274).[1]

The *only* evidence that the particular crimes alleged were committed, or that petitioner committed them, consisted of hearsay statements of Ms. Anderson, which were admitted by the trial court, sometimes over the objection of petitioner, or of his advisory counsel, or on occasion at petitioner's insistence contrary to the advice of his advisory counsel. Petitioner made no inculpatory statements to police.

There were many hearsay statements admitted against petitioner: Ms. Anderson's statements to her parents, made at approximately 4:45 P.M., within one hour of the offense, which occurred at approximately 4:20 to 4:30 P.M., according to Ms. Anderson's statements; her statement to investigating officer Patsy Meyer, the first officer on the scene, who arrived at the scene at 5:45 P.M. (R. 102, p. 214); and her statement to detective Tangel, who arrived at the scene at 6:35 P.M. (R. 102, p. 256), two hours after the offense. All of these state-

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[1] References to the record are to the volume number of the transcript as assigned by the Clerk, and the page. "R.95, p.274 refers to the volume given document number 95, and page 274 of that volume of the transcript.

ments were made on the date of the offense, May 9, 1980. All were objected to by the defense, and continuing objections were permitted by the trial court and placed of record on several occasions (R. 101, p. 119; R. 102, p. 203).

These statements were all admitted by the trial court, over objection of the defense, under the *res gestae* exception to the hearsay rule. The trial court stated:

> THE COURT: There are exceptions to the hearsay rule. One of them is exclamations made at the time an offense is committed, and those have been permitted in testimony in other trial [sic] in other courts.
>
> That was what was admitted to begin with in this case. I limited it to what Ms. Anderson said to her parents, to the police *within the hour of the alleged incident.*

(R. 96, p. 135).

In addition to the statements of May 9, the trial court admitted, over defense objections, a statement made by Ms. Anderson on May 16, consisting of an arrest warrant containing an affidavit signed by Ms. Anderson. (R. 96, p. 12-14). The affidavit contained a statement accusing petitioner of the burglary, sodomy and assault charges. The defense objection was on the grounds that the affidavit and warrant contained hearsay and did not possess sufficient indicia of reliability. The District Court found that the admission of this warrant and affidavit was error, but not "an error for which federal habeas relief is available." (Op. p. 8b, *post.*).

Petitioner had filed a motion to exclude Ms. Anderson's identification of him from a photo-pak on May 15, but, against the advice of his advisory counsel, petitioner indicated that he wanted to withdraw that motion, and officer Tangel thereafter testified that Ms. Anderson had identified petitioner as her assailant. (R. 102, p.276-278).

Ms. Anderson had given to police on May 22, a long, detailed affidavit, 4 pages in length, single-spaced, concerning the offenses in question. On the following day, May 23, she

responded to a series of 16 detailed questions by police which were raised by her May 22 affidavit, and she responded with another three-page single spaced statement.

When petitioner cross-examined officer Tangel about a shirt recovered from his apartment which police sought to have Ms. Anderson identify as that worn by her attacker (which she did not), a conversation which occurred between Tangel and Ms. Anderson on May 22, the prosecution insisted that Ms. Anderson's seven-page statements of May 22 and 23 were now admissible because petitioner had "opened the door" to their use.

Petitioner's advisory counsel argued to the contrary, and reasserted the defense objection to every use of hearsay statements made by Ms. Anderson (R. 96, p. 122). The trial court inquired of petitioner, not whether he objected to the hearsay, but whether he wanted the statements to be admitted into evidence. When he replied that he did, the trial court asked whether petitioner was capable of conducting his own defense, and petitioner answered honestly (but incorrectly) that he was capable. A recess was called to permit advisory counsel to discuss the matter further with petitioner. During the recess, the trial court ordered petitioner's eleven-year-old son, who had been in attendance at the trial, to leave the courtroom for the duration, over defense objections, (R. 96, p. 127). Petitioner, asked again by the trial court whether he felt competent to handle his own defense, replied "More than ever." (R. 96, p. 128).

The trial court advised petitioner that she did not want any appellate court to look at the record and to conclude that the May 22 and 23 statements had been admitted except with the consent of the defendant (R. 96, p. 129), and there were further discussions about petitioner's qualifications to conduct his defense. The trial court advised that his consent to the admission of the statements was "not in [petitioner's] best interest," and advisory counsel indicated that petitioner should be represented by counsel and that a motion for mistrial

should be made (R. 96, p. 130). The trial court explained the significance of the statement, discovered that petitioner had never seen the statement, and expressed surprise that he wanted it admitted. Advisory defense counsel explained that he felt an objection to the statements was valid, and stated again that "we must consider a mistrial and have Mr. Wright represented. I think that things are just getting completely out of line." (R.96, p. 133). But petitioner rejected the help of counsel. It is to be noted that even the prosecutor expressed misgivings about petitioner's ability to represent himself (R. 97, p. 150).

The trial court intimated that she felt a duty to intervene if a litigant was being unfairly taken advantage of, (but chose not to do so). Petitioner replied that the reason he sought the admission of all statements by Ms. Anderson was because some statements were admitted, but that Mrs. Anderson had never testified; so he wanted all of the statements admitted, even though he had not seen the long statements of May 22 and 23. Then, the following colloquy occurred:

> THE COURT: You're saying two things, Mr. Wright. You're saying, number one, you shouldn't allow any statements in; and you're saying, number two, bring in the statement. I don't know what you want.
>
> MR. WRIGHT: What I'm saying is, in the very beginning, I shouldn't be in this trial here, because it was a violation of my Sixth Amendment rights. And the Court is telling me there's two ways that you can read the Sixth Amendment rights. *I only read it one way.*
>
> *I am entitled to cross examine my accuser. That's period right there. I am not getting that right,* and that will overturn this case, whatever the outcome is. I know that.
>
> So, I want the whole case to go to that Jury, and I believe those twelve people right there will see the truth, and I'm hoping. I'm depending on them to.

After further discussions about the statement, during which

the trial court and prosecution agreed the statements were not admissible, the trial court overruled advisory counsel's motion for a mistrial (R. 96, p. 144-145). Advisory counsel then stated:

> MR. JEWELL: I just want to enter in the record, as further grounds for that, I believe if an attorney, myself or any other member of our office, would have conducted the proceedings such as has been conducted in the examination of Detective Tangel, that we would be held herein as ineffective assistance. That's why I move for mistrial.

Id.

The statements of May 22 and May 23 were admitted into evidence against petitioner.

Petitioner offered testimony of alibi witnesses, and also Mr. and Mrs. Moore, who were next-door neighbors of Ms. Anderson, whose apartment shared a wall with Ms. Anderson's apartment, and who indicated that they were home at the time of the alleged attack, but heard nothing of the struggle and screaming related by Ms. Anderson, though the apartments were not soundproof and normal everyday sounds could be heard through the walls (R. 97, pp. 122-123 [Mrs. Moore] R. 97, p. 140 [Mr. Moore]); petitioner also secured from Ms. Anderson's parents and the police officers who responded, the unanimous conclusion that Ms. Anderson had been drinking (R. 101, p. 136; R. 102, p. 170; that police did not believe her story until she had identified petitioner (R. 96, p. 74) and that police felt that it was a suicide attempt (R. 102, p. 216; R. 102, p. 257); Ms. Anderson gave different descriptions of her assailant; on May 9, he weighed about 160 pounds and had a scar (R. 102,p. 215); the statement of May 22 indicated he weighed 180 pounds and a scar was not mentioned (Joint appendix, Court of Appeals, p. 3).

Interestingly, the emergency room physician who treated Ms. Anderson opined that, while the wounds on her wrists

were not typical suicide attempt wounds, there being no "hesitation marks," and the cuts being uniformly smooth and all at the same depth on both wrists (R. 102, p. 227), they could conceivably have been self-inflicted (R. 102, 235). More importantly, it was the doctor's opinion that the wounds, "a little deeper that scratches," could *not* have been inflicted while Ms. Anderson was struggling; indeed, the doctor testified that for the wounds to be as they were, "*She would have had to have been somewhat cooperative.*" (R. 102, p. 238). When asked whether the wounds were inflicted by someone attempting to kill her (Ms. Anderson's statement indicated her assailant stated that he would make it look like a suicide), the doctor testified, "Oh, absolutely not." (R. 102, p. 245), basing that opinion on the superficiality of the wounds. The doctor also testified that he saw no evidence of trauma to the wrists which he would expect to notice had she been bound at the wrists as she had told her parents and the police. (R. 102 p. 246, 247).[2]

Despite the Petitioner's efforts at defending himself, the jury was out for over nine hours, and indicated that it was deadlocked. Following an "Allen" instruction, the jury returned in 20 minutes with guilty verdicts on all four charges and sentence recommendations on all four.

Following a persistent felony offender trial, at which a prior conviction required to secure the enhanced sentence for per-

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[2] These evidentiary matters are cited here to exemplify the unreliability of the hearsay statements of Ms. Anderson. Petitioner did not challenge below the sufficiency of the evidence except as to the persistent felony offender and the intimidating a witness counts. If Petitioner is successful in obtaining reversal of his sodomy, assault and burglary conviction here, the intimidation count is moot, as the one year sentence has already long since been completed. The persistent felony offender enhancement will also be moot if the convictions on the principal charges are overturned. The weaknesses in the prosecution's case demonstrated by the foregoing do raise interesting questions concerning the weight, rather than the constitutional sufficiency of the convictions, however; see *Tibbs* v. *Florida*, 457 U.S. 31 (1982).

sistent felony offenders was challenged because petitioner (who was now represented by counsel) had moved at the time of the prior offence to "withhold the rendition of judgment entered," which motion was granted, (arguably rendering non-existent the conviction relied upon by the state to enhance punishment) petitioner was sentenced to 66 years imprisonment. His originally-recommended sentence of 37 years was enhanced by 29 years in the persistent felony offender proceeding. His appeals in Kentucky courts, as well as his federal habeas corpus action and appeal, were all denied. The courts below uniformly treated his Sixth Amendment confrontation challenges as no more that a matter of state evidentiary contentions and denied relief, because petitioner, acting *pro se* as his own attorney, had allegedly acquiesced in the admission of the evidence later challenged. His other challenges fared no better, and he filed this Petition, his last attempt to secure his rights and his freedom.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Sixth Amendment confrontation clause issue was raised at trial by the objection of petitioner to the hearsay statements admitted by the trial court, and was argued throughout every appeal and habeas corpus proceeding. The due process argument that a trial court must intervene when a *pro se* defendant embarks upon a course which will inevitably result in the denial of his rights to such an extent that the result of the trial cannot be relied upon as having provided a just result, has been raised below, as the holding that petitioner is bound by his self-misrepresentation has provided the justification for the holding by the trial court and every other court which has reviewed this case that petitioner is not entitled to relief.

SUMMARY OF ARGUMENT

Petitioner was convicted of sodomy, burglary and assault in a Kentucky state court. There was but one witness who could have testified as to the offenses and the identity of the offender, the purported victim. That victim died before trial, but without having ever been under oath, in open court, or subject to cross-examination. Nevertheless, the trial court, over objection, permitted several statements of the victim into evidence, following which petitioner, representing himself, insisted that other statements by the purported victim be introduced in evidence. Petitioner asserts that the admission of such evidence by the trial court prejudiced his right to confrontation under the Sixth and Fourteenth Amendments. The statements themselves are unreliable, as well as constitutionally inadmissible. Petitioner's confrontation rights were violated by his conviction and 66 year sentence on the "testimony" of a witness who was never in open court, never under oath, and never subject to cross-examination.

The justification of the trial court and all courts which have reviewed this case subsequently, that petitioner, by his self-misrepresentation, brought the error and its consequences upon himself, has raised an issue as to whether, and to what extent, the due process clause permits the conviction of a *pro se* defendant which occurs as the result of his mis-representation. It is essential to continued public confidence in our criminal justice system that the results of criminal trials be just and reliable. By permitting a *pro se* defendant to blunder his way into a conviction, the courts do not serve that system well, though the state obtains an easy conviction.

The due process clause must be held to limit the rule of *Faretta* v. *California*, 422 U.S. 806 (1975), and to provide that, whether or not a *pro se* criminal defendant may raise ineffective assistance of counsel on an appeal from his conviction, he and the integrity of the criminal justice system are protected by the due process clause from the results of his folly where it is clear to the trial court that the defen-

dant has embarked upon a course of self-destruction, and particularly where, as here, both the prosecutor and appointed advisory counsel express serious misgivings about the handling of the defense by the accused, and where, as here, advisory counsel moves for a mistrial and a retrial with counsel assigned to represent the defendant.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HAS BLURRED AND OBSCURED THE VERY REAL AND SIGNIFICANT DIFFERENCE BETWEEN THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND THE HEARSAY RULE, AND REPRESENTS AN ABUSE OF THE CONFRONTATION CLAUSE OF THE MOST BLATANT SORT, WITH THE RESULT THAT THE PETITIONER IS IMPRISONED FOR 66 YEARS ON THE HEARSAY STATEMENTS OF A WITNESS WHO WAS NEVER PRESENT IN COURT, NEVER UNDER OATH AND NEVER SUBJECT TO CROSS EXAMINATION. THE DECISION BELOW THUS CONFLICTS WITH THE DECISION OF THIS COURT IN BROOKHART V. JANIS, 384 U.S. 1 (1966).

THE ISSUE:

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS WILL TOLERATE THE CONVICTION OF ONE ACCUSED OF CRIME WHEN THE ONLY EVIDENCE THAT A CRIME OCCURRED, OR THAT THE ACCUSED WAS THE PERPETRATOR, CONSISTS OF OUT OF COURT STATEMENTS BY THE VICTIM, WHO NEVER TESTIFIES UNDER OATH, NEVER APPEARS IN OPEN COURT NOR IN ANY OTHER JUDICIAL HEARING, AND WHO IS NEVER SUBJECTED TO CROSS-EXAMINATION.

As stated, Petitioner was convicted and sentenced to 66

years' imprisonment on the sole evidence of hearsay statements of the victim, who died prior to trial without having testified under oath in any court or judicial proceeding and who was never subject to cross-examination by petitioner.

(1) The Confrontation Clause:

The specific constitutional right which was denied to petitioner is the Sixth Amendment right to confrontation, which right is binding on the states through the Fourteenth Amendment of the Constitution of the United States, *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The right to confrontation has three basic protections. It ensures (1) that the witness against the accused will give his testimony under oath, thus impressing the witness with the solemnity of the proceedings, the seriousness of his testimony, and guarding against false testimony by the possibility of a perjury prosecution; (2) that the witness will be forced to submit to the "greatest legal engine ever invented for the discovery of truth" – cross-examination; and (3) that the jury deciding the fate of the accused will have an opportunity to observe the demeanor of the witness first-hand, and thus be aided in the assessment of the credibility of the witness. *California* v. *Green*, 399 U.S. 149 (1970).

The right of confrontation is generally held to be secured by the confrontation clause of the Sixth Amendment, but this Court has given the right of cross-examination even broader significance, holding, for example, that it is implicit in the Sixth Amendment right to trial by jury:

> Trial by jury implies that the evidence developed against a defendant shall come from a witness stand in a public courtroom where there is *full judicial protection* of the defendant's right of confrontation, of cross-examination, and of counsel [Emphasis added].

Turner v. *Louisiana*, 379 U.S. 466, 472-3 (1964). And the right of confrontation has also been held to be implicit in the

fundamental fairness secured to all accused of crime by the due process clause:

> We . . . hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to . . . his day in court – [is] basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him . . . .

In re Oliver, 333 U.S. 257 (1948). And the Court has also stated that "The rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process," *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973).

(2) The Hearsay Rule.

Confrontation clause violations generally occur where hearsay testimony is admitted by a trial court. Hearsay is evidence consisting of an out of court statement by a declarant who is not present in court, not under oath and not subject to cross-examination, which statement is offered to prove the truth of the matter contained therein. Hearsay evidence is generally inadmissible, *California* v. *Green*, *supra*. But while the confrontation clause and the hearsay rule (and its exceptions) overlap to some extent, and are designed to protect the same values, there is not a total congruence. And of course, the confrontation clause, being a constitutional principle, must take precedence over the hearsay rule and its exceptions, which are merely evidentiary rules. *Brookhart* v. *Janis*, 384 U.S. 1 (1966).

There are, however, certain (and numerous) exceptions to the hearsay rule, which permit the use of hearsay testimony where the out-of-court statement is given under circumstances indicating the presence of certain indicia of reliability, that is, that the circumstances are such that the statement is most

likely to be true. For example, a confession or an admission against interest is deemed admissible as a hearsay exception because it is assumed that one would not make a statement against his own interest unless that statement is true.

This Court, in fact, has permitted the use of certain hearsay evidence in the face of constitutional challenges based upon an alleged denial of the right of confrontation; but without exception, such evidence has been admitted because at the trial itself, or at some other judicial hearing, the right of confrontation and cross-examination was honored. For example, the admission of a witness' preliminary hearing testimony has been held by the Court to be constitutionally proper where the witness is shown by the prosecution to be unavailable and the defendant was given the opportunity to cross-examine the witness at such preliminary hearing, *Ohio* v. *Roberts*, 448 U.S. 56 (1980), or where the declarant testifies as a witness, his hearsay statement can be used without offending the confrontation clause because he is present before the jury, is under oath, and is subject to cross-examination, *California* v. *Green*, *supra*.

But this Court has never authorized or approved the total violation of the confrontation clause implicit in this case, where the declarant whose declarations constitute the *sole* evidence of the crime with which the accused is charged, and the sole evidence of his identity as the perpetrator of the offense, is never under oath, never testifies in any courtroom or legal proceeding, and is never subject to cross examination.

In *Pointer* v. *Texas*, *supra*., the Court found a confrontation clause violation where there was no cross-examination of the declarant in a prior preliminary hearing; in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the Court ruled improper the admission of a statement of a codefendant who was present in court, but who asserted his privilege not to testify and was *Janis*, *supra*., a curious case where the defendant, while not thus not subject to cross-examination. And in *Brookhart* v. pleading guilty, indicated he would require only a prima facie

showing by the state, this Court held that the accused was nonetheless entitled not to have a hearsay statement by one not present nor subject to cross-examination used in evidence against him.

(3) The trial court committed violations of the confrontation clause prior to Petitioner's tactical decision to seek admission of all of Ms. Anderson's hearsay statements, and, in fact, the error of the trial court compelled Petitioner's erroneous tactical decision.

The evidence of the purported offenses of which petitioner was convicted consisted entirely of the hearsay statements of Ms. Anderson, which were admitted by the trial court either under the *res gestae* exception to the hearsay rule, or, after defense objections to such testimony were denied, at the insistence of our *pro se* petitioner, who made a tactical decision that, since some hearsay evidence was admitted by the trial court, albeit erroneously, he could only impeach that evidence by seeking the introduction of all statements of Ms. Anderson, including several statements which even the trial court conceded were well beyond the scope of the *res gestae* exception. It was evidently petitioner's hope that there would be sufficient contradictions in Ms. Anderson's various statements that he would be acquitted.

The trial court admitted the first of such statements, the statements of May 9 to Ms. Anderson's parents and to the police, under the *res gestae* exception to the hearsay rule. But the trial court had ruled that only those statements made within the hour of the offense would be so admitted. It is obvious, except to the courts below, that even under the trial court's limitation of admissible statements to those made within an hour of the offense, i.e., before 5.30 p.m. at the latest, the statements to the police officers should not have been admitted.[3]

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[3] The statements to the parents as well would be inadmissible under the Kentucky case cited as authority for their admission, *Preston* v.

The trial court also admitted the arrest warrant, which included an affidavit by Ms. Anderson charging petitioner with the principal offenses, sodomy, burglary and assault. The trial court gave no reason for the admission of this hearsay; it obviously was not under the *res gestae* exception, as it was given over a week later. Indeed, there is no justification for the admission of the affidavit, and the District Court found it to be error, but apparently not constitutional error.

All of the reviewing courts which have reviewed this case have claimed that the hearsay that was admitted against petitioner was admitted because of his malfeasance in acting as his own defense counsel. With all due respect to all of the distinguished jurists on those courts, ***such is simply not the case.***

Three of Ms. Anderson's statements, those to officers Meyer and Tangel on May 9, and the affidavit of May 16, were admitted by the trial court over specific objections of the defense, and are not admissible under any exception to the hearsay rule, being outside the limits set by the trial court itself (the May 9th statements to police), or being totally inadmissible (the affidavit attached to the arrest warrant of May 16). At no time did petitioner or his advisory counsel consent to the admission of these statements, or waive the error implicit in their admission.

The statements to Ms. Anderson's parents, while within the time limitation for *res gestae* statements set by the trial court, nevertheless violated the confrontation clause (as did *all* of Ms. Anderson's statements), and were inadmissible under the Kentucky cases cited on evidentiary grounds as well. See footnote 3, *ante*.

Commonwealth, 406 S.W.2d 398 (1966), because there the victim and another witness who was present at the crime were present in court and were cross-examined by the defense. There, the right of confrontation was mostly, though not completely honored. Here, it was totally denied, as petitioner never received the opportunity to cross examine Ms. Anderson. For a case factually closer to this, where the statements to police six hours after the offense were inadmissible, see *Cook* v. *Commonwealth*, 351 S.W.2d 187 (1961).

As the courts below note, however, petitioner did cause the admission of some very damaging, otherwise inadmissible hearsay. He withdrew his motion to suppress the identification by Ms. Anderson on May 15 through the photo-pak, and and consented to its admission against counsel's advice. He also seemed to request that the damaging statements of May 22 and 23 be admitted, though his position is not all that clear, as he did assert, toward the end of the colloquy with the Court, that he was being denied his Sixth Amendment right to cross-examine his accuser. The prosecutor slyly asked petitioner not whether he objected to the May 22 and 23 statements, but whether he wanted them admitted, pandering to petitioner's frequently stated desire that all available evidence be given to the jury.

It is evident, however, that the petitioner's decisions to seek, or at least not to oppose, the admission of this damaging evidence was impelled by the constitutional error committed by the trial court in erroneously admitting the statements to police and the affidavit. By the time admission of the identification evidence and the May 22 and 23 statements was discussed, the trial court had already admitted, *over objection*, and the jury had heard, several inadmissible hearsay accusations. The only option which, to petitioner, offered any chance of success at that point was to acquiesce in the admission of all of Ms. Anderson's statements in the hope that inconsistencies would develop which would cast some doubt on her credibility; *petitioner even then complained that he was being denied his right of cross-examination;* it was this denial which compelled him to the fatal tactical error of acquiescing in the admission of the hearsay evidence, thus causing the violation of the very constitutional right which he sought to assert.

Ironically, the facts brought out in open court in this action demonstrate the total unreliability of Ms. Anderson's statements: she had been drinking; her injuries were inconsistent with her version of the offense, but consistent with a suicide attempt; the trained police officers who responded doubted

her story; those officers, and others, believed initially that what had occurred was a suicide attempt; the violent screaming struggle she allegedly put up to frustrate her attacker went unheard by neighbors who could hear normal sounds through the walls; her mother noted a lamp on the floor and the bed was askew, yet nothing was overheard; Ms. Anderson had on occasion previously been untruthful with her father (R. 102, p. 199); she refused her mother's suggestion to call the police immediately (R. 101, p. 122). She failed to mention the alleged sexual assault described to her parents when she was separately interrogated by police officers the same evening as the alleged offense. Her description of the assailant the night of the offense was significantly different from her description in the May 22 and 23 statements (the assailant had gained 20 pounds and lost a scar). Finally, and significantly, was the testimony of the emergency room doctor that Ms. Anderson would have to be completely still, *and cooperative* for the wounds she suffered to have been inflicted in the way that they were, whether or not she herself inflicted them.[4] And, it must be recalled that these inconsistencies are significant: the jury was out over nine hours, despite the errors of the trial court and the deficiencies in petitioner's trial strategy which permitted the admission of Ms. Anderson's hearsay statements.

The irony implicit in the inconsistencies set forth above is that the reasons that there are exceptions to the hearsay rule is that under the circumstances present in those exceptional cases, it is logical to assume that the hearsay statement is true

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[4] The Court of Appeals cited as part of its opinion (by xerox copy from respondent's brief, with citations "whited out", cut and pasted by xerography into the decision below), conclusions of the doctor that the wounds would have been difficult to have been self-inflicted, and that Ms. Anderson looked molested rather than suicidal, *ignoring the doctor's more significant opinions that she had to be perfectly still and even cooperative* when these uniform wounds, no deeper than scratches, were inflicted. While we yield to none in our admiration of the Court below, such cut and paste decision making by any Court is not only inappropriate, but subject to error; and the error is evident here.

because the situation is such that the statement is likely to be reliable. Yet the hearsay statements admitted here are indelibly stained by the taint of unreliability. Not only does the admission of the statements of Ms. Anderson constitute violations of state hearsay rules, but it constitutes a grievous violation of petitioner's Sixth Amendment right of confrontation.

Cases such as this exemplify the difference between the confrontation clause and the hearsay rule, and illustrate the wisdom of this Court's oft-stated recognition that the confrontation clause is much more than a mere codification of the hearsay rule. Exhaustive research has failed to reveal a single reported case such as this, wherein one is convicted of a serious crime *totally* upon the hearsay statements of an accuser who dies before trial without giving testimony of any kind, in any judicial or quasi judicial setting, without being under oath and without being subject to cross-examination.

What occurred here is reminiscent of the Star Chamber proceedings described by the Court in *Faretta* v. *California*, 422 U.S. 806 (1975), where "The proof was usually given by reading depositions, confessions of accomplices, letters, and the like . . . ." 422 U.S. 806, at 824, n21. The same type of constitutional violation, also with the partial consent of the accused, occurred in *Brookhart* v. *Janis*, *supra*, with which holding the decision below conflicts completely.

The rejection of petitioner's contention by the courts below has resulted in a *de facto* reduction of the confrontation clause into a codification of the hearsay rule, and an incorrect and flawed codification at that. This Court should accept this case for review, to place the Constitution once again above mundane, often-abused, and variously interpreted evidentiary rules.

The Court is urged to make it clear once and for all that under our Bill of Rights a state may not imprison a man without first providing him a fair trial at which his accuser

appears in court, under oath, and is subjected to cross-examination.

• • •

Each of the four courts which has reviewed this case, including the trial court, has held that the error in the admission of the inadmissible evidence was accomplished at "petitioner's agreement (or urging) against his appointed counsel's advice." (Opinion below, p. 6a). See also the opinion of the District Court, p. 5-6b and the Kentucky Supreme Court, p. 2c. While from the outset petitioner has complained that the admission of such evidence constituted a violation of due process as well as the confrontation clause, the courts below have treated the question merely of one of interpretation of mere evidentiary rules.

The justification for the admission of all such evidence because petitioner mistakenly insisted upon the admission of some of it (and only after considerable tainted evidence was admitted over his objection and that of his advisory counsel), is that he asked for it, or "opened the door" to its admission. But, as has been noted, there was considerable discussion at trial as to whether petitioner believed himself competent to handle his defense after he had made the strategic decision to seek admission of all statements of Ms. Anderson, in the belief that since the trial court had admitted considerable evidence in violation of the confrontation clause, his only hope lay in the hope that any inconsistencies between the statements that had been admitted and those statements he later agreed or urged upon the trial court to admit, would result in acquittal.

Thus was raised the second question presented in this Petition, the refusal by the reviewing courts below, based upon a mistaken interpretation of *Faretta* v. *California*, *supra.*, *to* hold that the trial court had a duty under the due process clause of the Fourteenth Amendment to declare a mistrial and to require counsel when it appeared that petitioner's actions were going to further violate his constitutional right to confrontation.

Interestingly, none of the reviewing courts even cited *Faretta*, but there is absolutely no doubt that the holding in a footnote in that case that one proceeding *pro se* in a criminal case cannot complain about ineffective assistance of counsel provides the fundament for the rulings of the reviewing courts below that petitioner cannot complain about the admission of the constitutionally-tainted evidence.

The real question, to which we now turn, was not whether petitioner waived any error, nor, as the trial court indicated, whether petitioner believed himself competent to proceed further; rather, it was whether the constitution permitted further proceedings under the circumstances where it appeared that petitioner was about to embark upon a course which could only lead to the destruction of his defense.

II

THE FACT THAT SOCIETY HAS AN OVERRIDING INTEREST IN THE RELIABILITY AND JUSTICE OF THE RESULTS OF CRIMINAL CASES REQUIRES THAT FARETTA V. CALIFORNIA AND THE LATER RIGHT TO COUNSEL CASES BE INTERPRETED AND CLARIFIED TO DETERMINE WHAT LIMITS, IF ANY, ARE PLACED UPON THE RULE OF FARETTA BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, SO THAT THOSE CRIMINAL DEFENDANTS ELECTING TO PROCEED PRO SE AT TRIAL ARE NOT DIVESTED BY THEIR IGNORANCE OF BASIC AND FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO THE FUNDAMENTALLY FAIR TRIAL SECURED BY THE FOURTEENTH AMENDMENT TO ALL WHO STAND ACCUSED OF STATE CRIMINAL VIOLATIONS.

THE ISSUE:

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE INTERVENTION OF THE TRIAL COURT TO DECLARE

A MISTRIAL AND/OR TO APPOINT COUNSEL AS MORE THAN A MERE ADVISOR WHEN IT APPEARS THAT THE TRIAL STRATEGY OF A *PRO SE* CRIMINAL DEFENDANT WILL RESULT IN THE ADMISSION OF CRUCIAL, PREJUDICIAL, BUT CONSTITUTIONALLY INADMISSIBLE EVIDENCE AGAINST THE ACCUSED, TO AN EXTENT THAT THE ADVERSARIAL TESTING PROCESS WHICH IS ONE OF THE HALLMARKS OF A FAIR TRIAL WILL BE SO UNDERMINED THAT THE TRIAL CANNOT BE RELIED UPON AS LIKELY TO PRODUCE A JUST RESULT.

In *Faretta* v. *California, supra.*, the Court ruled that the Sixth Amendment right to counsel, applicable to the states through the Fourteenth Amendment, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), guarantees that a defendant in a state criminal trial has a constitutional right to defend himself without counsel when he voluntarily elects to do so.

The majority in *Faretta* cited with approval the decision in *Adams* v. *United States ex. rel. McCann*, 317 U.S. 269 (1942), in which Justice Frankfurter, writing for the Court, stated that to require counsel if the defendant does not want one is "to imprison a man in his privileges and call it the Constitution." 317 U.S. at 279. But "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators," *United States* v. *Cronic*, ____ U.S. ____, 104 S.Ct. 2039, 2046 (1984).

Surely petitioner here, a 55-year old man only two years into a 66-year sentence, is not imprisoned by his constitutional rights, but by their denial; a denial in which he was admittedly a participant, but not the only, or even the primary, one. While petitioner is in part responsible, it has been demonstrated in Part I of this Petition that he was significantly disabled by the trial court's erroneous and unconstitutional rulings before he elected to disarm himself by insisting that

the rest of the purported victim's hearsay statements be admitted, in petitioner's belief that once several constitutionally-tainted statements had already been admitted, he had no real choice save to seek admission of the other statements (and thereafter to hope and pray that other inconsistencies would develop so that he could attempt the impeachment of the credibility of the only witness against him, who was never in court, under oath, nor subject to cross-examination). The trial court and all courts which have since ruled on this case bear far more responsibility than does petitioner for his unjust imprisonment.

In assessing claims of the ineffectiveness of trial counsel, the Courts are principally concerned with the extent to which the reliability of the outcome has been impaired by the alleged violation. As the Court has stated in the context of a claim of denial of effective counsel, the test is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland* v. *Washington*, ____ U.S. ____, 104 S.Ct. 2052, 2064 (1984).

While the issue of whether a *pro se* criminal defendant may have a conviction reversed because his own performance as his attorney deprived him of the Sixth Amendment right to the effective assistance of counsel was apparently decided in *Faretta*, in a footnote[5] which, through *dictum*, seems unequivocal, *Faretta* did not decide whether the due process clause places any limitations on the extent to which an accused may misrepresent himself.

The possibility that *Faretta* would result in grossly unfair and unjust results in cases where defendants misrepresented themselves into prison (or worse, into the death chamber) was not unnoticed, however. Chief Justice Burger, joined by Justices Blackmun and Rehnquist, dissented, concerned that

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[5] 422 U.S. at 834, n46: ". . . The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license

the duty of trial courts and prosecutors to see that justice is done would be diluted or disregarded in the name of the questionable freedom of a *pro se* defendant to represent himself, and consequently to "go to jail under his own banner." The criminal justice system should "not be available as an instrument of self-destruction." 422 U.S. at 839.

Justice Blackmun, separately dissenting, joined by the Chief Justice and Justice Rehnquist, opined correctly that the majority in *Faretta* "ignores the established principle that the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' (citations omitted). For my part, I do not believe that any amount of *pro se* pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated *pro se* defendant." 422 U.S. at 849, [emphasis added].

Justice Blackmun correctly criticized the Court's conclusion "that self-representation must be allowed despite the obvious dangers of unjust convictions in order to protect the individual defendant's right of free choice. . . . I cannot agree to such a drastic curtailment of the interest of the State in seeing that justice is done in a real and objective sense." *Id.* at 851.

This case is a quintessential and extreme example of the evils that can flow from the unbridled application of *Faretta*. It remains to be decided – indeed, it *must* be decided – whether the due process clause will protect a *pro se* defendant where his self-misrepresentation, combined with constitutional error committed by the trial court, permits him to be convicted and sentenced to a lengthy prison term or even death,

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not to comply with relevant rules of procedure and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"

This ruling was followed in *McKaskle* v. *Wiggins*, also in a footnote, ____ U.S. ____, 104 S.Ct. 944, 951, n8 (1983).

on evidence which every court and lawyer at every level of the state and federal judicial systems – every one save the *pro se* defendant himself – agrees would have been inadmissible.

It is imperative that this Court review and reverse the decision below, and find that the due process clause will protect a *pro se* criminal defendant against gross and grievous violations of his constitutional rights engendered in part by his own miscalculations and strategic decisions, but which decisions were compelled by constitutional error of the first magnitude committed by the trial court.

It is also imperative that *Faretta* be interpreted to require the trial courts of our Nation to put a stop to further proceedings where it appears that the continued self-representation of the accused will inevitably result in constitutional violations. At the very least, trial courts should not be prevented by *Faretta* from terminating self-representation under such circumstances. That request was made by advisory counsel below, and the trial court did give lip-service at least to the principle that there was a limit; but, given the actions, rather than words of the trial court, and all reviewing courts since involved in this case, one wonders whether such a limit exists, and, if so, where on earth it is.

The *Faretta* majority did allude to the necessity of a trial court stepping in in mid-trial and terminating self-representation in situations where the defendant "deliberately engages in serious and obstructionist misconduct." The Court also indicated that termination of self-representation "may be necessary". 422 U.S. at 834, n46. But the Court did not state whether the termination of self-representation would or could occur where the defendant was not guilty of misconduct or obstruction, but was "merely" making a shambles of his defense and the Bill of Rights by virtue of his ignorance of the law, of procedures, or both, as occurred below.

Prior to *Faretta*, this Court had held that, in situations involving complicated criminal charges, counsel was necessary. The Chief Justice, concurring in *Mayberry* v. *Pennsylvania*,

400 U.S. 455 (1971), expressed the same concerns as expressed in his dissent in *Faretta*: that standby counsel be appointed to appear with the accused. And the reason was that "In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted *in order to vindicate the process itself*." 400 U.S. at 467-468 [Emphasis added].

Here, of course, standby counsel was involved, but his correct and proper initial objections to the admission of Ms. Anderson's tainted statements were ignored, and thereafter, petitioner, asserting his right under *Faretta*, made the strategic blunders which might imprison him for the rest of his life.

Before counsel was required in all serious criminal cases by *Gideon*, the Court noted on several occasions that the circumstances of a case might be such that due process required the assistance of counsel. *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Gibbs* v. *Burke*, 337 U.S. 773 (1949); *Cash* v. *Culver*, 358 U.S. 633 (1959); *McNeal* v. *Culver*, 365 U.S. 109 (1960); *Townsend* v. *Burke*, 334 U.S. 736 (1948), wherein the court ruled that though counsel was not constitutionally required in a non-capital case, where the absence of counsel results in the accused being taken advantage of, due process has been violated.

Faretta should not be applied so mechanically that trial courts deem themselves forbidden to intervene when it appears that the defendant's self-representation is becoming misrepresentation to the extent that important constitutional protections are rendered meaningless. For "[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused," *Glasser* v. *United States*, 315 U.S. 60, 71 (1942). "Moreover, even after the request to proceed *pro se* has been granted and the defendant

has begun his defense, the trial court has a continuing responsibility to watch over the defendant and insure that his incompetence is not allowed to substitute for the obligation of the state to prove its case." *Pickens* v. *State*, 292 N.W.2d 601 (Wis. 1980). There, in a post-*Faretta* case, the Wisconsin Supreme Court has wisely held as we urge the Court to hold here. See also *State* v. *Shank*, 410 So.2d 232 (La. S.Ct. 1982), where *Faretta* was held not to permit a capital defendant to waive counsel to facilitate his suicidal desires, and *Hawkins* v. *State*, 613 S.W.2d 720 (Tex. Ct. Cr. Ap. 1981), where the Court pointed out that "neither the Supreme Court nor this Court has ever indicated that an accused who is exercising his independent constitutional right to represent himself is fair game for the state and its witnesses."

But *Faretta* has been taken to its logical extreme as well (indeed, it appears that *Faretta* will, unless and until modified as we urge here, be its own logical extreme), as in *State* v. *Rogers*, 303 N.W.2d 788 (Neb. 1980), where the accused who represented himself was a 72 year old man with organic brain damage. The Nebraska Supreme Court, relying upon *Faretta*, held that his conviction would be upheld, regardless of his incompetence.

Here, of course, the principal claim is that petitioner's right to confrontation was denied by the trial court first, and thereafter by the trial court at petitioner's insistence after considerable constitutional error had been committed by the trial court in its admission of considerable damaging hearsay testimony. But the fact that the defendant himself may be the victim of the constitutional violations resulting from his self-misrepresentation does not change the fact that the Constitution is cheapened by the result.

Surely petitioner's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland* v. *Washington*, *supra*., 104 S.Ct. at 2064.

For "[a]lthough we have adopted an adversary system of justice, . . . the prosecution is more than an ordinary litigant, and the trial judge is more than an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, *in the broadest sense of that term*, is achieved at every criminal trial. . . . That goal is ill-served and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel." Burger, C.J., dissenting in *Faretta*, 422 U.S. at 89.

CONCLUSION

While petitioner has suffered grievously, his case has implications reaching far beyond the scope of this one appeal. The principal constitutional issue is, of course, the complete and total denial of petitioner's rights under the confrontation clause. But the issue of whether the due process clause places limitations on the unbridled application of *Faretta* has lurked in the background of this case through each stage of the proceedings, from the trial through the decision of the United States Court of Appeals for the Sixth Circuit assailed herein. The silent misinterpretation of *Faretta* by the trial court and all courts since to give *carte blanche* to trial judges and prosecutors to violate the rights of *pro se* defendants who, through ignorance or mistake, consent to or actively participate in the violation of their own constitutional rights indeed gives the prosecution the means whereby cheap, easy and unjust convictions may be obtained.

Our judicial system is, or should be, above such a mockery of the Bill of Rights. No government, federal or state, should desire or require convictions so obtained. The confidence of the public in the criminal justice system, already considerably eroded, cannot be bolstered by such unjust, and unreliable results as occurred below.

This is petitioner's last opportunity to receive justice. Only this Court stands between petitioner and the certainty that the rest of his life will be spent in prison for offenses of which he was unjustly convicted in violation of the Bill of Rights, and for offenses which, it is entirely likely, never even occurred at all.

The Court is respectfully urged to grant the Petition for a Writ of Certiorari, to hear the case on its merits, and to reverse and remand this case with instructions to grant to petitioner every right which is his as a citizen of our Nation.

Respectfully submitted,

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APPENDIX A

Not To Be Published

84-5087

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM ALLEN WRIGHT,
Petitioner-Appellant,

vs.

AL PARKE, Warden,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

(Filed October 17, 1984)

Before: EDWARDS and CONTIE, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Per Curiam. Petitioner-appellant in this case appeals from denial of his petition for writ of habeas corpus. Petitioner was convicted in a trial in May 1982 on charges of sodomy, burglary, assault, intimidating a witness and of being a first degree persistent felon under Kentucky law. He has been sentenced to 66 years of confinement and is currently serving same.

The problems in this case are complicated primarily by two facts. First, the only direct proof of the sodomy and assault charges was that furnished by the complaining witness who died before the trial of this case from causes unstated in this record but apparently unrelated to the crimes alleged. The second major problem in this case is generated by the fact that petitioner, at trial, insisted upon representing himself, and although the court appointed advisory counsel, he frequently disregarded said counsel's advice and in several important instances insisted upon the admission of evidence which he otherwise would have had every right to exclude. It is petitioner's basic contention that he was the victim of mis-identification by the now deceased victim.

Since there is some plausibility to appellant's contentions, we have examined the record of this trial with great care. We now conclude that there were no federal constitutional deprivations which would warrant our ordering the issuance of a writ of habeas corpus. In this regard, we are in agreement with the Supreme Court of Kentucky, which court affirmed the judgments of conviction in an opinion including the following language:

> "The victim, Debra L. Anderson, was deceased at the time of trial. Wright represented himself from the outset with an appointed advisory counsel. We are advised in Wright's brief of every procedural step taken before trial, but none of the facts adduced at trial.
>
> There is a fleeting reference to the trial in that we are advised the Commonwealth produced sixteen witnesses and that the Commonwealth's case hinged on introduction of affidavits, indictments, opinions and hearsay.
>
> Wright complains that it was error to permit the introduction into evidence of the indictment charging intimidation of a witness together with the affidavit on which it was based. Wright insisted that the affidavit be read to the jury, and when the indictment was read only asked the trial court to admonish the jury that the indictment

had no evidentiary value, which was done. The objection to introducing these documents into evidence was on the ground that the information was already before the jury. Wright demanded the error here and cannot now complain.

During the course of the jury deliberations, the jury returned to open court for the purpose of making inquiries to the trial court. The trial court made proper answers to the inquiries, and we do not see any coercive charge to the jury as argued by Wright.

Other assertions of error by Wright do not merit discussion.

On the persistent felony offender phase of the trial, Wright argues that the Commonwealth failed to prove that he had not been discharged from probation on the last prior felony. The Commonwealth proved the commission of the crimes on the primary charge occurred within the five-year period of probation, and the parole officer testified there was no record of Wright's having been discharged from probation at that time. This is sufficient.

The judgment is affirmed.

All concur."

Wright v. *Kentucky*, No. 82-437, slip op. at 1-2 (Ky. March 30, 1983).

We accept the statement of facts in the state's brief as supported by the evidence at trial:

A summary of trial testimony and proceedings follows.

Lenore Anderson, Debra Anderson's mother, testified she received a phone call from her daughter at approximately 4:45 p.m. on May 9, 1980, during which Debra seemed "terribly, terribly upset," reported a man had come to her apartment and "hurt" her, and asked her parents to "just come quickly." (TE 101, pp. 106, 113, 121-

122.) Mr. and Mrs. Anderson drove immediately to the apartment and called the police and Emergency Medical Service [EMS] as soon as they observed their daughter's condition (TE 101, pp. 122-124, 148, 169-170). Debra had three or four slash marks on each wrist which required approximately forty stitches (TE 101. p. 124; TE 102, pp. 225-226).

Richard Anderson, the victim's father, testified that Debra was "very, very upset" when they arrived.

Her parents related her statements that "a man" was apparently in her apartment when she arrived and that "he" grabbed her from a doorway as she walked down the hall.

She was pulled into the bedroom where her attacker strapped her to the bed and unsuccessfully attempted to receive sexual gratification through oral sodomy.

He became angry and left the room (*Id.*). Debra heard the kitchen knife sharpener in operation and then her attacker returned with a knife and cut her wrists saying, "I'm going to make this look like suicide." (*Id.*). She said when the phone rang a few minutes later, he shook his head as though in a trance and removed the straps and left.

Debra told her parents she locked the door and called them immediately (*Id.*). Upon their arrival they observed the bedroom in disarray, blood on the bed, a lamp on the floor, and a paring knife in the corner. On cross-examination, Lenore Anderson stated Debra may have had a couple of glasses on wine on May 9.

When the police arrived, Debra and her parents were interviewed separately (TE 101, pp. 129, 189). Following the interviews and EMS treatment of the wounds, Mr. and Mrs. Anderson took Debra to the hospital emergency room where they stayed from approximately 7 p.m. to 11 p.m.

• • •

Dr. Harvey Mark Diamond, who treated Debra Anderson in the hospital emergency room, testified she had three or four lacerations on each wrist which he closed with thirty-nine stitches.

The cuts were described as very smooth and straight, all exactly to the same depth, with no evidence of hesitation marks; they were not typical suicide wounds.

He indicated it would be very difficult to self-inflict such wounds. On cross-examination Dr. Diamond expressed the opinion Ms. Anderson had not attempted suicide and said she "looked more like somebody who had been molested than somebody who had been suicidal. He described her appearance at the hospital as "very upset," "very disheveled . . . makeup all a mess . . . hair all undone."

Appellee's Brief at 1-4.

We now summarize the issues of this case and give our considered answers as follows:

1. Did the admission into evidence of a copy of the indictment and a copy of an arrest warrant violate petitioner's right to due process and right to a fair trial?

Not under the total circumstances of this trial.

2. Did the trial judge's conduct, in excluding petitioner's son, in the refusal to sequester the jury, and his use of an "Allen" charge, violate petitioner's right to a fair trial?

No.

3. Was there sufficient evidence to support the convictions of intimidating a witness and first degree persistent felony offender?

Yes.

4. Did the admission of certain hearsay statements violate petitioner's right to confront witnesses against him?

Certain statements were inadmissible without petitioner's agreement (or urging) against his appointed counsel's advice.

5. Did the prosecutor's conduct violate petitioner's right to a fair trial?

No.

Admissible statements taken from witnesses within a reasonable period of time indicate that there was evidence from which the jury could have concluded that there had been an assault on Debra Anderson at the time and placed alleged, and that she immediately sought her parent's help and gave a description of the assailant which the apartment manager recognized as applicable to the defendant. Although he presented an alibi defense at trial, we believe it was within the jury's function to decide the identification issue. Further, while this clearly was not a perfect trial, the trial judge was faced with some extraordinary circumstances.

In sum, we conclude that the District Judge's denial of a petition for writ of habeas corpus was appropriate under this record and his judgment is affirmed.

ISSUED AS MANDATE: NOVEMBER 8, 1984
COSTS: NONE:

[Certificate Omitted]

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C-83-0459-L(B)

WILLIAM ALLEN WRIGHT

Petitioner

v.

AL PARKE, WARDEN,
Kentucky State Penitentiary

Respondent

MEMORANDUM

William Allen Wright has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The relief is sought from his conviction in the Commonwealth of Kentucky of sodomy, burglary, assault, intimidating a witness and being a persistent felon in the first degree. The convictions were affirmed by the Kentucky Supreme Court.

Wright has also filed a motion to act as co-counsel. Since he has been ably assisted by counsel in these proceedings and since the Court has not rejected any writings tendered by Wright, we deny the motion to act as co-counsel. We also note that Wright insisted upon acting as his own counsel at trial. He did so over the repeated admonitions of the court and the frequent advice by his advisory counsel to reconsider his decision. Wright would have done well to have heeded this sound

advice because many of his complaints in this proceeding are the fruit of his own handiwork.

Wright first argues that he was denied his Fourteenth Amendment right to due process of law and his Sixth Amendment right to a fair and impartial trial when the trial court admitted into evidence indictment number 80CR0735 and the July 15, 1980 affidavit of Deborah L. Anderson. As to the introduction of the affidavit, Wright cannot be heard to complain. In his cross-examination of Detective Tangle, Wright asked the witness about the affidavit and, after having the witness identify the document, had Detective Tangle read the contents of the victim's affidavit. This occurred after Wright was advised against such a course by his advisory counsel who made the advice a part of the record. Wright insisted that he needed to pursue the cross-examination on the affidavit as a means to present his theory of the case.

Later in the Commonwealth's case, the prosecutor moved to introduce into evidence the July 15, 1980, affidavit and the indictment Number 80CR0735. There was no objection to the admission of the affidavit. In any event, since Wright had previously introduced the contents of the affidavit through the testimony of Detective Tangle, the matter was already in evidence. At most, the introduction of the affidavit itself was cumulative, but certainly not of the magnitude of a constitutional issue.

The trial court admitted the indictment into evidence as an exhibit over the objection of Wright's advisory counsel. The indictment had previously been read into the record by Sergeant Howard, with the only objection raised by Wright or his advisory counsel being a request for an admonition to the jury to the effect that the indictment was not evidence of guilt. The trial court promptly gave the requested admonition.

It is undisputed that an indictment is not to be considered as evidence of guilt. *United States* v. *Scales*, 594 F.2d 558 (6th Cir. 1979). In Kentucky, the case of *Richardson* v. *Commonwealth*, Ky., 483 S.W.2d 107 (1972), held: "Except in

unusual siuations which we cannot foresee, the indictment has no place in the hands of the jury and should not be permitted in the jury room." *Id.* at 106. The Commonwealth has not argued that any unusual circumstances existed here. Therefore, under the *Richardson* case, we concluded that the indictment should not have been admitted as an exhibit which could, under Ky.R.Cd.P. 9.72, be taken into the jury room. However, this is solely a question of state evidentiary law. Even if a federal constitutional question were presented here, the admission of such evidence would be within the discretion of the trial court. *Oliphant* v. *Koehler*, 594 F.2d 547 (6th Cir. 1979), *cert. denied*, 444 U.S. 877, 100 S.Ct. 162. Wright has failed to raise a federal constitutional claim.

Wright maintains that he was denied due process and his right to a fair trial when the trial judge excluded his son from the courtroom, failed to sequester the jury and denied him the right to present an effective defense. The issues concerning the exclusion of Wright's son from the courtroom and the sequestration of the jury are matters of state procedural rules. They simply do not raise federal constitutional questions. Wright has not even attempted to demonstrate how these issues might rise to the level of a constitutional question.

Wright also contends that he was denied the opportunity to present his theory of the defense. His argument is grounded upon the fact that the trial court overruled his pre-trial motions. However, he does not state what any of these motions were nor how they were of constitutional magnitude. Again, pre-trial motions are generally a matter of state procedural rules which will not establish a basis for federal habeas corpus jurisdiction. These alleged state errors of nonconstitutional dimensions may not be considered in a cumulative fashion to establish federal habeas jurisdiction. *Johnson* v. *Spalding*, 510 F.Supp. 164 (E.D. Wash. 1981), *affirmed*, 667 F.2d 589, *cert. denied*, — U.S. —, 103 S.Ct. 254.

Wright complains that the trial court's charge to the jury pursuant to *Allen* v. *United States*, 164 U.S. 492, 17 S.Ct. 154

(1896) was coercive. The jury had deliberated for quite some time when a conference was requested with the judge. The judge was asked if Wright would be retried if the present jury deadlocked. After informing them that such a decision was up to the Commonwealth, the trial court urged the jurors not to decide lightly that they could not reach a verdict. The judge stated that a considerable amount of time had been spent on the case and a decision was important to all persons involved with the case. The trial court did explain that the same decision did not have to be reached on all charges, but that the verdict on each charge must be unanimous. The jury deliberated further and returned after a short while with verdicts of guilty on all charges.

Wright insists that the trial court's supplemental charge to the jury was coercive and thus deprived him of a fair trial. The Kentucky Supreme Court reviewed this matter and found that the trial court's answers and charge to the jury were proper and not coercive. Such a finding is to be accorded a high degree of deference in a habeas proceeding. 28 U.S.C. Section 2254(d); *Marshall* v. *Lonberger*, — U.S. —, 103 S.Ct. 843 (1983). In this instance, we readily defer to the state court's determination because we agree with it entirely.

Wright would have coercion inferred from the fact that the jury returned with a verdict shortly after the supplemental charge and from the judge's statement in the charge that a decision was important to all parties. In *United States* v. *Giacalone*, 588 F.2d 1158 (6th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, it was held as follows: "The speed with which a jury may reach a verdict following the giving of the charge cannot be considered in determining whether the given charge was improper as coercive when given . . . ." *Id.* at 1168. Therefore, no inference may be drawn from the jury's short deliberation after the supplemental charge. Also, the judge's statement regarding the importance of a decision was merely stating the obvious and should be read in conjunction with her original charge to the jury which emphasized that the

jurors should not be swayed if they were convinced of the correctness of their views. There was no coercion in the trial court's charge here. *See United States* v. *LaRiche*, 549 F.2d 1088 (6th Cir. 1977), *cert. denied*, 430 U.S. 987, 97 S.Ct. 1687.

Wright next argues that he was denied a fair trial and due process based on prosecutorial misconduct in failing to disclose exculpatory evidence. Much of this argument relates to evidence concerning the victim's mental health. There is nothing in the record to indicate that the Commonwealth had any information in its possession. While the victim's mother testified that her daughter spoke with a family friend who was a psychiatrist, this one instance was not an official consultation. Therefore, it is conceivable that no record was made and that even if it were, the record was not in the possession of the Commonwealth. There is no constitutional issue here.

Wright also argues that the prosecutor made inflammatory remarks to the jury. The comments to which we are cited relate to the testimony of a thirteen-year-old who stated that she and Wright were together smoking marijuana and drinking. The statement of the prosecutor were directly related to that evidence. Even if the comments were to be construed as inflammmatory, there is no constitutional issue raised here *when all the record is examined.*

Wright next attacks the admission into evidence of certain hearsay statements as being violative of his Sixth Amendment right of confrontation. First, as to the May 15 photographic identification by the victim, Wright withdrew the objection made by his advisory counsel because it conflicted with Wright's trial strategy. As we have previously noted, Wright himself introduced the contents of the affidavit of July 15 into the record.

Concerning the May 22 statement and answers to questions given by the victim, it is true that advisory counsel had moved that such after-the-fact statements be excluded. However, Wright questioned Detective Tangle about certain details of the statement and also stated that he wanted the May 22 state-

ment introduced. The trial court again questioned Wright about the propriety of his handling his own defense. Wright insisted that he was capable of doing so. It is clear that Wright himself sought the admission of evidence which might have been inadmissible.

Wright did object to the introduction of evidence concerning the victim's May 9 statements and her affidavit in support of the May 16 arrest warrant. This evidence related to the sodomy charge. Once again Wright has raised matters concerning evidentiary rulings by the trial court. In any event, the trial court's determination that the May 9 statements were admissible is supported by Kentucky evidentiary law. *Preston* v. *Commonwealth*, Ky., 406 S.W.2d 398 (1966).

The May 16 affidavit which was made some seven days after the incident cannot be admissible under the *Preston* case as argued by the Commonwealth. However, the question for habeas relief is not whether the court erred in admitting evidence, but whether such admission violated Wright's constitutional rights. In light of all the evidence which was properly admitted, the admission of the May 16 affidavit did not constitute an error for which federal habeas relief is available. *Bryson* v. *State of Alabama*, 634 F.2d 862 (5th Cir. 1981).

Finally, Wright contends that he was denied due process of law by the trial court's refusal to direct a verdict of not guilty because of insufficiency of evidence on the charge of intimidating a witness and of being a persistent felony offender in the first degree. As to the conviction for intimidating a witness, there was sufficient, albeit, conflicting, evidence to submit the case to the jury. Under the standard of *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), habeas relief should be granted if, upon the evidence at trial, it is found that no rational trier of fact could have determined guilt beyond a reasonable doubt. In applying the *Jackson* standard, the evidence must be viewed in a light most favorable to the prosecution. It must be assumed that all conflicts were resolved in favor of the prosecution. *Delk* v. *Atkinson*, 665 F.2d 90 (6th

Cir. 1981); *Fuller* v. *Anderson*, 662 F.2d 420 (6th Cir. 1981), *cert. denied*, 455 U.S. 1028, 102 S.Ct. 1734.

The only conflict in the evidence on the intimidation charge relates to a portion of the victim's affidavit which recounted that she was followed by Wright. Wright produced a Jefferson County Police Officer who testified that he was with Wright at the time he was supposed to have been following the victim. Obviously, this evidence is conflicting. However, assuming that the jury resolved the conflict in favor of the prosecution, the victim's statement would have been believed.

In any event, there was other evidence on this charge which related to Wright's having appeared at restaurants where the victim or her friends were present and to his having approached them in an attempt to have them cause the victim to change her mind. Wright argues that this behavior did not constitute a threat to the victim under KRS 524.040 as defined in KRS 514.080. Under KRS 514.080, threatening to inflict bodily injury or to commit any other criminal offense is a threat for the purpose of KRS 524.040 relating to intimidating a witness. At a minimum, a jury could conclude that Wright's conduct constituted harassment under KRS 525.070. Therefore, there was sufficient evidence on the elements of the crime upon which reasonable triers of fact could have found Wright guilty beyond a reasonable doubt.

Wright further claims that there was insufficient evidence to support his first-degree persistent felon conviction on the grounds that there was no proof that he was on probation or had been discharged from probation within five years prior to the date of commission of the present felony. KRS 532.080. The date of the commission of the present offense was May 9, 1980. Wright maintains that there was no evidence to show that he was on parole or probation from any previous felony conviction.

The most recent conviction introduced by the prosecution was October 14, 1975, for which Wright received a five-year sentence which was either probated or withheld. The precise

language of the answer of the custodian of the documents was as follows: "[The sentence] was five years withheld or probated for five years." The reason the testimony should be examined is that under the version of KRS 532.080 which was in effect at the time of Wright's trial, a withheld sentence may have implied a conditional discharge under KRS 533.020. Under the then KRS 532.080 a conviction which resulted in a conditional discharge may not have fallen within the criteria for a previous felony conviction.

Applying once again the *Jackson* standard, we determine that a rational trier of fact could have determined from the testimony that Wright's sentence was probated for five years. Therefore, he would have been on probation at the time of the commission of the offense and the criteria of KRS 532.080 were met.

Wright's petition for a writ of habeas corpus will be denied, and an appropriate order has been entered this 14th day of November, 1983.

/s/ THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel
Petitioner

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 83-0459-L(B)

WILLIAM ALLEN WRIGHT

Petitioner

v.

AL PARKE, WARDEN,
Kentucky State Penitentiary

Respondent

ORDER

(Entered May 14, 1983)

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the petiton of William Allen Wright for a writ of habeas corpus be and it is hereby denied, and this action be and it is hereby dismissed with prejudice.

It is further ORDERED that the petitioner's motion to act as co-counsel be and it is hereby denied.

There is no just reason for delay, and this is a final and appealable order.

This 14th day of November, 1983.

/s/ THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to:
Petitioner
Counsel of record

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 83-0459-L(B)

WILLIAM ALLEN WRIGHT

Petitioner

v.

AL PARKE, WARDEN,
Kentucky State Penitentiary

Respondent

ORDER

(Entered January 11, 1984)

This matter is before the Court on the petition of the petitioner for rehearing.

The Court has considered the memorandum filed in support of the petition and finds nothing therein that has not been previously considered and rejected by the Court.

The petition for rehearing is denied.

IT IS SO ORDERED this 11th day of January, 1984

/s/ THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to: Petitioner
Counsel of Record

APPENDIX C

Rendered: March 30, 1983
Not to be published

SUPREME COURT OF KENTUCKY

82-SC-437-MR

WILLIAM ALLEN WRIGHT
APPELLANT

v.

COMMONWEALTH OF KENTUCKY
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLGA S. PEERS, JUDGE
 # 80-CR-0916 & 80-CR-0735

MEMORANDUM OPINION OF THE COURT

Affirming

William Allen Wright was convicted of burglary in the first degree, sodomy in the first degree and intimidating a witness. These convictions were enhanced by a conviction of being a persistent felony offender in the first degree to consecutive sentences of sixty-six years imprisonment. We affirm.

Wright represented himself at trial. The trial court appointed a public defender as advisory counsel. Wright and the advisory counsel signed a document setting out the responsibilities of the public defender. The section pertaining to the trial provided that where there was a conflict between

Wright and the public defender on Wright's theory of the case and objection to evidence, a decision by Wright to waive an objection would appear on the record.

The victim, Debra L. Anderson, was deceased at the time of trial. Wright represented himself from the outset with an appointed advisory counsel. We are advised in Wright's brief of every procedural step taken before trial, but none of the facts adduced at trial.

There is a fleeting reference to the trial in that we are advised the Commonwealth produced sixteen witnesses and that the Commonwealth's case hinged on introduction of affidavits, indictments, opinions and hearsay.

Wright complains that it was error to permit the introduction into evidence of the indictment charging intimidation of a witness together with the affidavit on which is was based. Wright insisted that the affidavit be read to the jury, and when the indictment was read only asked the trial court to admonish the jury that the indictment had no evidentiary value, which was done. The objection to introducing these documents into evidence was on the ground that the information was already before the jury. Wright demanded the error here and cannot now complain.

During the course of the jury deliberations, the jury returned to open court for the purpose of making inquiries to the trial court. The trial court made proper answers to the inquiries, and we do not see any coercive charge to the jury as argued by Wright.

Other assertions of error by Wright do not merit discussion.

On the persistent felony offender phase of the trial, Wright argues that the Commonwealth failed to prove that he had not been discharged from probation on the last prior felony. The Commmonwealth proved the commission of the crimes on the primary charge occurred within the five-year period of pro-

bation, and the parole officer testified there was no record of Wrights' having been discharged from probation at that time. This is sufficient.

The judgment is affirmed.

All concur.

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1385

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALLEN WRIGHT - - - Petitioner

versus

AL PARKE, WARDEN - - - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 3, 1985

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether This Court is Precluded From Considering Questions of Admissibility of Certain Hearsay Statements Where Prior Courts Reviewing the Entire Record Found This Evidence was Admitted at Petitioner's Insistence or Without any Contemporaneous Objection as Required by *Wainwright v. Sykes.*

II. Whether Petitioner's Right to Confrontation was Violated by Admission of the Victim's Excited Utterances Following the Crime.

III. Whether This Court Lacks Jurisdiction to Consider Argued Limitations on the Right of Self-Representation When This Issue Has Not Been Raised by Petitioner in any State or Federal Court.

IV. Alternatively, Whether a State Court is Obligated by Due Process to Deny a Defendant's Right to Represent Himself Because the Defendant's Strategy Appears Unwise.

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No. 84-1385

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALLEN WRIGHT - - - *Petitioner*

v.

AL PARKE, WARDEN - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are correctly set forth in petitioner's Appendices.

JURISDICTION

Respondent respectfully disagrees with the inference in petitioner's jurisdictional statement that the claims presented here were "asserted below." Petitioner did raise in state and federal court the claim that he was denied his right of confrontation by the admission of the deceased victim's *res gestae* statements on the day of the crime, May 9. However, United States District Judge Thomas A. Ballantine, Jr., held this claim presented merely a question of

state evidentiary law and that the statements were admissible under Kentucky law. (Petitioner's Appendix B, p. 6b.) As to any other statements of the victim, the courts below held that these statements were admitted with petitioner's agreement or urging and/or that no constitutional question is presented under the totality of the circumstances of trial.

Petitioner boldly asserts that the decisions of the lower courts "that petitioner, by his self-misrepresentation, brought the error and its consequences upon himself, has raised an issue as to whether, and to what extent, the due process clause permits the conviction of a *pro se* defendant which occurs as the result of his mis-representation" (Petition, p. 11). Petitioner, however, fails to advise this Court that he has never challenged the validity of his waiver in any lower court nor has he ever asserted the new claim that there are due process limits on the right of self-representation.

Petitioner's jurisdictional statement is totally devoid of the requirements of 28 U.S.C. §1257(3) and the mandates of Rule 21.1(h). Petitioner has not and cannot specify where in the lower courts any federal questions were raised, the method of raising them and the way they were passed upon by the court. Petitioner's attempt to bootstrap the issue demonstrates his inability to show the federal questions were "timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Rule 21.1(h).

Respondent further notes that the decisions below turn on the "extraordinary circumstances" of the case and any decision by this Court would affect only petitioner. The purpose of review by writ of certiorari is not to give the defeated party another hearing. The petition for writ of certiorari should be denied.

Respondent addresses the jurisdictional issues in greater detail below and, alternatively, responds briefly on the merits in the event this Court should disagree that it lacks jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly quotes the constitutional provisions he alleges are involved in this petition. Respondent respectfully disagrees that any constitutional issue is properly before this Court.

COUNTERSTATEMENT OF THE CASE

A. Trial Testimony and Proceedings

William Allen Wright chose to represent himself at trial and insisted repeatedly that he was familiar with the law and did not want counsel to interfere with his right to represent himself or to make his own strategic decisions. The trial record reflects petitioner had changed counsel four times prior to requesting permission to proceed *pro se* (TH 1/8/82, pp. 2-3). A public defender, the Honorable Franklin P. Jewell, was appointed as advisory counsel. Wright and the advisory counsel signed a document setting out the responsibilities of the public defender. This document provided that at trial "where there was a conflict be-

tween Wright and the public defender on Wright's theory of the case and objection to evidence, a decision by Wright to waive an objection would appear on the record." (Slip Opinion, Supreme Court of Kentucky, p. 1.)

Evidence at trial was introduced as follows:

Lenore Anderson, Debra Anderson's mother, testified she received a phone call from her daughter at approximately 4:45 p.m. on May 9, 1980, during which Debra seemed "terribly, terribly upset," reported a man had come to her apartment and "hurt" her, and asked her parents to "just come quickly." (TE 101, pp. 106, 113, 121-122.) Mr. and Mrs. Anderson drove immediately to the apartment and called the police and Emergency Medical Service [EMS] as soon as they observed their daughter's condition (TE 101, pp. 122-124, 148, 169-170). Debra had three or four slash marks on each wrist which required approximately forty stitches (TE 101, p. 124; TE 102, pp. 225-226).

Richard Anderson, the victim's father, testified that Debra was "very, very upset" when they arrived (TE 101, pp. 170, 175).

Her parents related her statements that "a man" was apparently in her apartment when she arrived and that "he" grabbed her from a doorway as she walked down the hall (TE 101, pp. 127, 170). She was pulled into the bedroom where her attacker strapped her to the bed and unsuccessfully attempted to receive sexual gratification through oral sodomy (TE 101, pp. 127, 170-171, 190-196). He then became angry and left the

room (*Id.*). Debra heard the kitchen knife sharpener in operation and then her attacker returned with a knife and cut her wrists saying, "I'm going to make this look like suicide." (*Id.*) She said when the phone rang few minutes later, he shook his head as though in a trance and removed the straps and left (TE 101, pp. 128, 194). Debra told her parents she locked the door and called them immediately (*Id.*). Upon their arrival they observed the bedroom in disarray, blood on the bed, a lamp on the floor, and a paring knife in the corner (TE 101, pp. 125, 171-172). On cross-examination, Lenore Anderson stated Debra may have had a couple of glasses of wine on May 9 (TE 101, pp. 155-158).

When the police arrived, Debra and her parents were interviewed separately (TE 101, pp. 129, 189). Following the interviews and EMS treatment of the wounds, Mr. and Mrs. Anderson took Debra to the hospital emergency room where they stayed from approximately 7 p.m. to 11 p.m. (TE 101, pp. 130-132, 152, 173-174, 186).

Police Officer Meyer was the first Jefferson County Police Officer on the scene and obtained a report of the incident as well as a description of the unknown assailant (TE 102, pp. 207-209). She testified she had difficulty locating the apartment and finally sought assistance from the apartment manager, who accompanied her to the scene (TE 102, p. 207). Officer Meyer described the victim as "very distraught" and obviously suffering from a "very emotional experience" (TE 102, p. 210). On cross-examination

Officer Meyer responded, "She was very convincing." "I don't think she was acting. She was too upset to be acting." (TE 102, p. 218.)

Detective Walter Tangle testified he arrived at the scene at approximately 6:35 p.m. and found the victim in an "upset, highly emotional state" (TE 102, pp. 256-257). He talked with her out of the presence of others and received a substantially identical report of the attack and description of the assailant (TE 102, pp. 257-258, 269-270). Detective Tangle identified photographs of the victim, her wounds, and the scene taken upon arrival (TE 102, pp. 261-268). He testified the victim appeared to have been drinking and that the investigation was left open as a "cutting" since it was possible the wounds were self-inflicted (TE 102, pp. 270-272).

Dr. Harvey Mark Diamond, who treated Debra Anderson in the hospital emergency room, testified she had three or four lacerations on each wrist which he closed with thirty-nine stitches (TE 102, pp. 223, 225-226). The cuts were described as very smooth and straight, all exactly to the same depth, with no evidence of hesitation marks; they were not typical suicide wounds (TE 102, pp. 227-228). He indicated it would be very difficult to self-inflict such wounds (TE 102, p. 227). On cross-examination Dr. Diamond expressed the opinion Ms. Anderson had not attempted suicide and said she "looked more like somebody who had been molested than somebody who had been suicidal." (TE 102, pp. 236, 243.) He described her appearance at the hospital as "very upset," "very disheveled . . .

makeup all a mess . . . hair all undone" (TE 102, pp. 239-240).

During Lenore Anderson's testimony, advisory counsel objected to hearsay testimony of Debra Anderson's statements but was overruled based on *Preston* v. *Commonwealth,* Ky., 406 S. W. 2d 398 (1966). (TE 101, pp. 113-120.) A continuing objection was noted at the conclusion of Richard Anderson's testimony (TE 101, pp. 203-204). Prior to trial counsel agreed that Debra Anderson was "deceased." The jury was so advised but none of the details of her death were disclosed.

Prior to trial advisory counsel also moved to exclude testimony concerning the identification made by Debra Anderson of petitioner as the attacker; however, this motion was withdrawn the morning of trial at petitioner's request since it conflicted with "his theory of the case and the evidence he wishes to present" (TE 101, pp. 98-99). When evidence of the identification was to be introduced, petitioner again affirmatively waived his objections (TE 102, pp. 273-277, 279). The apartment manager, Sarah Eddy, testified at trial that she accompanied Officer Meyer to the scene Friday, May 9, and overheard Ms. Anderson's description of the attacker (TE 96, pp. 249-254). Ms. Eddy described the victim as in a "very upset state" (*Id.,* p. 253). Ms. Eddy returned to her office, called her supervisors to report that the victim's description fit an apartment resident named William Allen Wright, and then provided this information to the police on Monday (*Id.,* pp. 254-257). Detective Tangle testified he received

this information when he returned to work on Wednesday, May 14; he contacted Ms. Eddy, prepared a photo pack containing petitioner's photograph and those of six persons with similar characteristics, and showed the photo pack to Ms. Anderson on May 15 (TE 102, pp. 277-279: TE 96, pp. 8, 65-66). Ms. Anderson immediately and unequivocally identified petitioner from the photo pack (*Id.*). Ms. Anderson was not aware of petitioner's name or that he was an apartment resident until advised that day by Officer Tangle (TE 96, pp. 66-69). An arrest warrant and search warrant were prepared May 16 (TE 96, pp. 9-10).

Ms. Anderson told Officer Meyer her attacker was dressed in khaki pants and a navy shirt (TE 102, p. 209). In petitioner's statement to the police on June 11, 1980, he volunteered that he never in his life wore a dark blue shirt and khaki pants but he had difficulty recalling how he learned these items of clothing were significant (TR 916, pp. 28A-29). Becky Johnson, who petitioner admitted was with him the afternoon of May 9, testified petitioner was dressed in "khaki jeans, canvas shoes and ā navy blue shirt." (TE 94, p. 18.)

Lenore and Richard Anderson also testified that their daughter arrived late for work on July 15, 1980, and appeared "absolutely overwrought," "scared to death" and "very distraught" (TE 101, p. 134; TE 102, p. 174). Debra told them that petitioner pulled behind her on her way to work from her parents' house where she had been staying, and followed her all the way to the office parking lot (TE 101, pp. 133-135; TE

102, pp. 174-175). Debra observed petitioner's Cadillac and a person behind the wheel with the same beard, glasses and cap (*Id.*). This incident was reported to Sgt. William Howard who testified he assisted Debra Anderson in the preparation of an affidavit the morning of July 15 (TE 95, pp. 320-323). He was called again that evening; received additional information, which he investigated; and then he presented the facts to a Grand Jury the morning of July 16 (TE 95, pp. 321-323).

Margaret Fisher, a part-time model for the Adams Agency, testified she and Debra went to a restaurant named Amy's after work on July 15 (TE 99, pp. 124-125). Shortly after they arrived, petitioner entered the restaurant and stood "peering" over them from the bar located on a raised level immediately adjacent to their table (TE 99, pp. 125-126, 130-131). Ms. Fisher stated there were no other people in the area and they were immediately aware of his presence (TE 99, p. 125). Debra became extremely uncomfortable and attempted to leave, at which point petitioner commented they should not leave on his account (*Id.*, p. 126). Ms. Fisher and Debra walked outside and observed only three cars on the whole block, two of them belonging to the two women, and a third car, the same type as petitioner's, parked right in front of them (TE 95, pp. 127, 133). Ms. Fisher said Debra was very upset and shaken by the incident; Ms. Fisher called Debra's parents, and they called the police (TE 95, p. 127). On cross-examination Ms. Fisher responded she

felt petitioner's conduct and comments to be a threat (*Id.*, p. 129).

Lieutenant Robert Ray testified petitioner pulled him over at the entrance of the La Fontennay Apartments shortly after 10:00 a.m. on Thursday, July 15 (TE 99, pp. 140-141). Petitioner identified himself and said he was "the one that some chick has accused of sodomizing" (*Id.*, p. 141). Petitioner then said he received an anonymous call telling him if he came to the corner in five minutes they were going to do him "some harm" (*Id.*, pp. 141-142). Petitioner was asked if persons in a nearby shopping center may have made the call but, without indicating he had seen it, petitioner said no (*Id.*, p. 142). While Lt. Ray looked about the area for a car that may have been involved in the threat, petitioner "tried to get back and start talking about the case he had been accused in" (*Id.*). Lt. Ray explained he was not interested and suggested contacting the detectives involved (*Id.*, pp. 142-143). Then petitioner remarked: ". . . . I've been misidentified. He said, they keep misidentifying me. He said, but it's not going to happen again." (*Id.*) Petitioner lifted his hat, ran his fingers through his hair, and repeated, ". . . . it's just not going to happen again."

Michael Grosso testified he was sitting at a table at Captain's Quarters with a group of friends in mid-July (TE 95, pp. 304-305). Mr. Grosso is in the advertising business and was in a position to direct business toward the Alex Adams Agency in which Debra Anderson had an ownership interest and served as president (TE 95, pp. 301-302; 101, pp. 108-111).

Mr. Grosso's date that evening was Carole Nussbaum, a model for the Alex Adams Agency (TE 95, pp. 311, 313). They were accompanied by Steve Bass, also in the advertising business, and his date Scarlett, both of whom were acquainted with the victim (*Id.*). A third couple was also present but their relationship to the victim was not specified (*Id.*). Petitioner approached the group; asked if anyone knew the victim; and after receiving an affirmative response, began talking about "what was going on with Debra" (TE 95, pp. 305-307). Petitioner then stated the allegations were not true and "that maybe somebody should try and tell her that — convince her that it's not true or something" (*Id.*, p. 307). The witness said he is 6'9", is frequently approached by strangers, and paid little attention to the conversation (TE 95, p. 305). He did not recall petitioner threatening the group but particularly remembered how everyone regarded the incident as very strange (TE 95, pp. 305, 307, 313).

A major prong of petitioner's trial strategy, as reflected in his closing argument, was to attack the credibility of the victim and her identification of him as her assailant (TE 100, pp. 281-313). Important to this attack was evidence that on July 15, 1980, while the victim claimed petitioner was following her, he was several miles away talking to a police officer. A second prong of petitioner's strategy was to portray himself as a victim of harassment by the prosecution and police (TE Pretrial Hearing ["PTH"], pp. 23-25; 96, pp. 32, 69-72, 102-105, 139).

During cross-examination of the investigating officer, Detective Tangle, petitioner established the police subsequently learned that the victim's identification of the person following her on July 15 may have been mistaken (TE 95, pp. 243-244, 246). Advisory counsel recommended petitioner cease the questioning at this point (TE 95, p. 247), but instead petitioner extensively cross-examined this witness concerning the July 16 separate indictment for intimidating a witness and the victim's affidavit submitted to the Grand Jury (TE 95, pp. 246-273). Against counsel's advice, petitioner chose to bring in Debra Anderson's July 15 affidavit (TE 95, pp. 250-252). He specifically asked that the affidavit be read to the jury (TE 95, pp. 256-257) and then asked whether he was indicted for following her or having someone who looks like him follow her (TE 95, p. 272).

When Sergeant Howard, who prepared the affidavit and presented it to the Grand Jury, was asked by the prosecution to read the indictment language, petitioner made no objection but asked the court to admonish the jury that the indictment had no evidentiary value (TE 95, p. 319). The admonition was promptly given (*Id.*). No objection was made when the affidavit and indictment were marked as exhibits (TE 95, pp. 315-316, 318). Nor was any objection made earlier when the court granted the prosecution's request to apprise the jury of the language of the indictment (TE 95, p. 268). When the prosecution asked that the documents themselves be introduced, petitioner objected on the ground that the information was

already before the jury (TE 95, pp. 324-325). The jury was instructed pursuant to RCr 9.56 that "the indictment shall not be considered as evidence or as having any weight against him" (TR New, p. 169).

The May 22 detailed statement and answers of Debra Anderson were initially called to the attention of the jury by petitioner despite strong warnings by the court and advisory counsel and were admitted into evidence after petitioner waived any objections (TE 96, pp. 120-123, 129-138, 176-195; TE 99, pp. 68-69, 82, 88).

Petitioner presented in his defense the testimony of Rebecca and Steve Moore who lived next door to the victim and did not hear screaming or a commotion in the victim's apartment the evening of May 9, 1980 (T 94, pp. 120-122, 141-144). Steve Moore stated he came home at 4:15 p.m. and that he thought they stayed home that evening but was not positive (TE 94, pp. 142-144). Likewise, Rebecca Moore could not recall if they went out that evening but said, if they did, it would have been after her husband showered after work (TE 94, pp. 123, 126). The testimony also revealed the apartment bedrooms were separated by adjacent baths and closets on each side of the dividing wall (TE 94, p. 152).

Petitioner also offered the testimony of Claire Heller, a thirteen-year-old, whom petitioner and his friends picked up on a corner at 2:45 p.m. on May 9 and who rode with them to the post office while he mailed a letter (TE 100, pp. 216-217). Ms. Heller said they returned to petitioner's apartment for awhile and

then he drove her home around 5:30 p.m. (*Id.*). She acknowledged on cross-examination that they drank beer and smoked some marijuana during this time (TE 100, pp. 221-222). Two post office employees recalled seeing petitioner in the post office on several occasions and acknowledged that an envelope offered into evidence was postmarked May 9. 1980 (TE 100, pp. 190, 193, 198, 200).

Petitioner recalled Lenore Anderson for the defense against advisory counsel's objections (TE 100, pp. 242-243). Mrs. Anderson said she smelled wine on her daughter's breath on May 9 and that she was a social drinker but did not have a drinking problem (TE 100, pp. 244-245, 248-249). Mrs. Anderson also stated Debra agreed, at her mother's request, to visit once with a family friend who was a psychiatrist and whom Mrs. Anderson thought might lead her daughter to Christ (TE 100, pp. 249-254).

During the persistent felon stage of the proceedings the Commonwealth introduced evidence of petitioner's prior convictions for escape from a reformatory in 1951, interstate transportation of falsely made securities in 1964, unlawful transportation out of state in 1965, and carrying a concealed deadly weapon in 1975. Petitioner received a five-year sentence, probated for five years, with a standard discharge date of October 14, 1980 (TE PFO, pp. 45-51, 99-100). The probation officer's records did not reflect that petitioner had been discharged (TE PFO, p. 100). For this stage of the trial, petitioner was represented throughout by retained counsel, the Honorable Thomas E. Clay.

The jury, after finding petitioner guilty of sodomy, burglary, assault, and intimidating a witness, also found petitioner guilty as a first-degree persistent felon and recommended a total sentence of sixty-six years (TE 100, pp. 348-349; TE PFO, p. 157; TR New, pp. 194-201).

Post-Conviction Proceedings

On direct appeal to the Supreme Court of Kentucky, petitioner was represented by new retained counsel, the Honorable Steven D. Yater, who raised nine issues, including claims that certain of the victim's hearsay statements were improperly admitted. The only due process claims raised related to (1) alleged prosecutorial misconduct in failing to provide certain information during discovery, trial objections, and comments on the evidence during closing argument and (2) alleged misconduct by the trial judge by exclusion of petitioner's son from the courtroom, the charge to the jury, and unsubstantiated claims regarding the court's rulings. No question was raised concerning any arguable limits on self-representation. Petitioner's conviction was affirmed by Memorandum Opinion dated March 30, 1983.[1]

On May 3, 1983, petitioner, represented by retained counsel, Honorable Steven D. Yater, sought federal

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[1]Petitioner meanwhile filed, through retained counsel Honorable F. R. Radolovich, a petition for writ of habeas corpus challenging denial of bail pending appeal [USDC, W. D. Ky., No. C82-0349-L(A)]. Mr. Radolovich withdrew after petitioner insisted on filing contradicting *pro se* pleadings. The petition was subsequently denied.

habeas corpus relief under 28 U.S.C. §2254 alleging many of the same errors presented in state court. Again, no question was raised concerning petitioner's ability to represent himself or any constitutional limitations on self-representation. Instead, Wright filed several *pro se* pleadings and moved to act as co-counsel in the federal district court. Following extensive review of the pleadings, the record, and the legal issues raised, the motion to act as co-counsel and the petition for writ of habeas corpus were denied November 14, 1983.

On November 28, 1983, petitioner *pro se* filed a state post-conviction relief motion in the trial court, the denial of which was affirmed by the Court of Appeals of Kentucky on February 15, 1985.

Meanwhile, petitioner appealed to the United States Court of Appeals for the Sixth Circuit through retained counsel, Honorable Russell K. Johnson. Present retained counsel, the Honorable H. Fred Hoefle, was substituted by petitioner shortly before oral argument. Once again, no claim was raised concerning limits on self-representation. After examining the record "with great care," petitioner's claims were rejected on October 17, 1984. It is from this Opinion that petitioner seeks review.

ARGUMENT

I.

Petitioner's Strategic Decisions to Urge Admission of Certain Hearsay Statements and his Failure to Challenge These Waivers Below Preclude Consideration by This Court as to Whether Admission of the Statements Violated Petitioner's Right of Confrontation.

Petitioner claims here he was denied his right of confrontation by admission of testimony concerning the deceased victim's identificatoin of him from a photopak on May 16, 1980; the victim's May 22 statement, questions and answers; the victim's July 15 affidavit setting forth facts of intimidation by Wright; and the July 16 indictment charging Wright with intimidation of a witness.

At the outset it must be noted that Wright did not challenge the July 15 items on confrontation clause grounds below. In the Supreme Court of Kentucky Wright's claim concerning the July 15 affidavit and indictment was characterized in his brief as follows: "The Court Committed Reversible Error When It Admitted Indictment 80CR0735 And The July 15, 1980 Affidavit Of Debra Anderson Into Evidence" (Wright's Brief, p. 10). At the conclusion of this argument Wright generally alleged a denial of due process rights under the Fifth and Fourteenth Amendments (Wright's Brief, p. 12). Neither the Sixth Amendment nor the Confrontation Clause was mentioned in Wright's argument or the opinion of the state court. Accordingly, this Court lacks jurisdiction to consider this claim. 28 U.S.C. §1257(3).

With respect to all of the above-listed statements, each court below found that Wright failed to contemporaneously object and/or affirmatively waived any claims. These findings are supported by at least the following portions of the record. Prior to the beginning of trial, advisory counsel withdrew his motion to exclude identification evidence because the motion conflicted with Wright's "theory of the case and the evidence he wishes to present" (TE 101, pp. 98-99). When the identification evidence was to be introduced, Wright again affirmatively waived his objections (TE 102, pp. 273-277, 279). During his cross-examination of Detective Tangle, Wright launched into a prolonged challenge of the July 15 indictment and the victim's supporting affidavit (TE 95, pp. 246-273). Wright specifically asked that the affidavit be read to the jury (TE 95, pp. 256-257). Wright sought only an admonition, which was given, when the indictment language was read to the jury (TE 95, p. 319). Wright's only objection to the introduction of these documents was that the information was already before the jury (TE 95, pp. 324-325. The victim's May 22 statement, questions and answers were initially discussed by Wright, despite warning by the court and advisory counsel, and were admitted after Wright waived objections (TE 96, pp. 120-123, 129-138, 176-195; TE 99, pp. 68-69, 82, 88).

Wright's allegation he chose this course of action only after the prosecution introduced the victim's excited utterances is totally refuted by his waiver of identification evidence before trial began and by his

repeated strategic assertions that he wanted the jury to know "everything" so they could see how he had been harassed by the police. Wright even came close to injecting into evidence that he was being investigated by the FBI for the murder of Debra Anderson (TE 96, pp. 109-112). In this instance, he wisely followed the advice of counsel and the court and abandoned the subject. Wright had retained counsel prior to his decision to proceed *pro se* and had discussed the case and his strategy with advisory counsel. He must now accept the consequences of his informed decisions. *Murch* v. *Mottram*, 409 U. S. 41 (1972).

Petitioner failed to allege or show any cause for and actual prejudice from his procedural defaults. Accordingly, review in federal habeas proceedings is barred. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Engle* v. *Isaac*, 456 U. S. 107 (1982).

II.

Admission of the Victim's Excited Utterances did not Deny Petitioner's Right to Confrontation.

Petitioner alleges the victim's hearsay statements constituted the "sole evidence of the crime . . . and the sole evidence of his identity as the perpetrator. . . ." He thereby attempts to distinguish other hearsay and confrontation cases.

Respondent respectfully notes that the victim's excited description of the crime and of her unknown attacker were heard by her parents and two police officers as soon as possible and within a few hours of the crime. The apartment manager accompanying

Officer Meyer identified petitioner from the description of Debra Anderson's attacker. Ms. Anderson did not know Mr. Wright and never connected him with the crimes until his picture was included in a seven-person photopak a week later. The emergency room physician described the physical evidence which corroborated the victim's version of the assault and stated the wounds were inconsistent with self-infliction. Petitioner's friend, who was with him near the crime scene earlier that afternoon, testified that Wright was wearing khaki pants and a navy blue shirt that day, the same clothing described by Ms. Anderson. Two acquaintances of Ms. Anderson identified petitioner as the person they saw intimidating Ms. Anderson. A third officer described Wright's strange behavior on July 15 as Wright attempted to establish an alibi for intimidation. Each of these witnesses was available at trial and was cross-examined at length by petitioner. Finally, petitioner volunteered in his statement to the police that he never in his life wore a dark blue shirt and khaki pants, yet he could not explain how he learned these items of clothing were significant. Contrary to petitioner's allegation, respondent submits Wright's conviction was based upon far more than just the victim's hearsay statements.

Turning to Wright's claim of a denial of confrontation, respondent first notes that the unavailability of the witness, due to her prior death, is undisputed. Under these circumstances the purpose of the Confrontation Clause is to augment accuracy.

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.' Dutton v. Evans [400 U. S. 74, 89 (1970)] and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' California v. Green, [399 U. S. 149, 161 (1970)]. . . ." *Ohio* v. *Roberts,* 448 U. S. 56, 65 (1980), quoting *Mancusi* v. *Stubbs,* 408 U. S. 204, 213 (1972).

When a hearsay declarant is not present at trial,

> ". . . the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate 'indicia of reliability.' *Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception.*" *Ohio* v. *Roberts, supra* at 66. (Emphasis added.)

The victim's statements to her parents and the police at the first opportunity promptly after the crime and while still in an undisputed state of nervous excitement and shock were admitted under Kentucky's *res gestae* or excited utterance exception to the hearsay rule. *Preston* v. *Commonwealth,* Ky., 406 S. W. 2d 398 (1966); *Cook* v. *Commonwealth,* Ky., 351 S. W. 2d 187 (1961); *Curtis* v. *Commonwealth,* Ky., 474 S. W. 2d 394 (1972). This exception is directly comparable to Federal Rule of Evidence 803(2) under which similar "excited utterances" have been admitted and Confron-

tation clause challenges rejected. In *United States* v. *Nick,* 604 F. 2d 1199 (9th Cir. 1979), there was no denial of confrontation by admission of statements of an unavailable three-year-old child to his mother, "Yeah, Eneas [Nick] stuck his tutu in my butt," and that Nick hurt him and made him cry. Nor was confrontation denied by admission of the child's description of the assault to a physician the next day. In *Guthrie* v. *United States,* 207 F. 2d 19 (D. C. Cir. 1953), the court affirmed admission of the deceased victim's statement, "Harry did it," and her description of the assault to police officers who arrived several hours after the crime. See also, *United States* v. *Iron Shell,* 633 F. 2d 77 (8th Cir. 1980), *cert. denied* 450 U. S. 1001.

In the present case, as in the foregoing cases, the indicia of reliability afforded by the victim's shocked and excited state and the corroborating evidence from independent witnesses were more than adequate to protect petitioner's right of confrontation. Accordingly, the petition must be denied.

III.

This Court May Not Consider, on Review of a Habeas Proceeding, the Issue of Possible Limitations on the Right of Self-Representation When the Question Has Never Before Been Raised by Petitioner in State or Federal Court.

Petitioner argues that decisions below noting petitioner's allegations of error were brought about by his own handiwork, in and of themselves, "raised an issue as to whether, and to what extent, the due process

clause permits the conviction of a *pro se* defendant which occurs as the result of his mis-representation" (Petition, p. 11). Petitioner's revealing concession that this issue "has lurked in the background of this case through each stage of the proceedings" demonstrates that no such question was ever presented to or considered by the courts below (Petition, p. 29). Petitioner cannot point to any portion of the record where the question was timely and properly raised so as to give this Court jurisdiction to review.

Had the question been raised in the initial habeas petition, the petition would have been dismissed pursuant to 28 U.S.C. §2254(b). *Rose* v. *Lundy,* 455 U. S. 509 (1982). Kentucky's post-conviction relief procedure through Rule of Criminal Procedure 11.42 provides an adequate mechanism for raising proper constitutional claims or claims that procedural defaults should be excused. *Hollin* v. *Sowders,* 710 F. 2d 264 (6th Cir. 1983); *Alcorn* v. *Smith,* 724 F. 2d 37 (6th Cir. 1983). In urging this Court to consider the question, petitioner flaunts the "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court." *Rose* v. *Lundy, supra* at 520.

Alternatively, the record in the present case demonstrates that petitioner, like Frank Murch in *Murch* v. *Mottram,* 409 U. S. 41 (1972), was warned and was fully aware of the consequences of his waiver of objections in the trial court. Wright had the assistance of competent advisory counsel and deliberately chose

not to heed counsel's warnings. Wright's conduct at trial and his failure to raise the present claim by post-conviction motion demonstrates a deliberate bypass of state procedures, thus barring habeas corpus relief.

IV.

A State Trial Court is Not Obligated by Due Process to Deny a Defendant's Right to Represent Himself Because the Defendant's Strategy Appears Unwise.

In the event this Court should disagree with respondent's position concerning lack of jurisdiction, the following alternative response on the merits is offered.

Petitioner claims the trial court was obligated to declare a mistrial or otherwise deny him his right to self-representation when Wright announced his strategic decisions to introduce hearsay testimony. Petitioner urges this Court to reconsider its decision in *Faretta* v. *California,* 422 U. S. 806 (1975), and to impose limits upon its holding that a defendant's choice to represent himself must be honored although "he may conduct his own defense ultimately to his own detriment." *Id.* at 834.

Respondent submits that the guidelines of *Faretta* were scrupulously honored in the present case by the appointment of advisory counsel and by repeated inquiries and warnings by the court through trial. Petitioner's conviction was amply supported by admissible evidence and the record fails to support petitioner's allegation that the prosecution obtained a cheap victory through petitioner's blundering and contrary to the obligation that justice be done. Nor does the record

support an inference that the jury was somehow inflamed by petitioner's strategic decisions. For each offense the jury imposed a moderate or minimal sentence. (TR 161-162; Burglary, 13 years; Sodomy, 15 years; Assault, 8 years; Intimidating a Witness, 1 year.) During the persistent felon proceedings where the sentences were enhanced, petitioner was represented by counsel (TR 191-192). The facts of the present case do not provide any basis for reconsideration of *Faretta.*

Moreover, this Court has recently reaffirmed the Sixth Amendment right of self-representation and noted that denial of that right can never be harmless error since the exercise of the right usually increases the likelihood of an unfavorable outcome. *McKaskle* v. *Wiggins,* 465 U. S. —, 79 L. Ed. 2d 122, at 133, n. 8 (1984). This Court reiterated that the primary focus of a challenge to the exercise of *Faretta* rights must be "whether the defendant had a fair chance to present his case in his own way." *Id.* at 132. Petitioner would limit this right to those circumstances in which a trial judge decides, in his discretion, that an accused is not presenting his best possible defense. Any other course of action would, under petitioner's analysis, deny the accused a due process right of "justice."

> "The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *Id.* at 132.

Petitioner here was granted that dignity and autonomy and knows that he cannot now claim his own ineffectiveness as counsel. Wright's attempt to shift to the trial court an obligation to deny self-representation when it is ineffective is an attempt to accomplish indirectly that which cannot be done directly. Wright's claim should be promptly rejected and his petition denied.

CONCLUSION

For all the foregoing reasons, respondent submits William Allen Wright's petition for writ of certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of May, 1985, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by mailing three copies, first-class postage prepaid, to Honorable H. Fred Hoefle, 1010 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, Counsel for Petitioner.

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